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In the Supreme Court of the United States

OCTOBER TERM, 1964

GILVIN-TERRILL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COUET OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:

Broomall Construction Co., 137 NLRB 344	7
Continental Oil Co. v. *National Labor Relations Board*, 113 F. 2d 473, modified and remanded, 313 U.S. 212	9
General Instrument Corp. v. *National Labor Relations Board*, 319 F. 2d 420, certiorari denied, 375 U.S. 966	7
Greene Construction Co., 133 NLRB 152	7
Mountain States Telephone and Telegraph Co., The v. *National Labor Relations Board*, 310 F. 2d 478	7
National Labor Relations Board v. *Burroughs Corp.*, 261 F. 2d 463	7
National Labor Relations Board v. *Delaware-New Jersey Ferry Co.*, 90 F. 2d 520	9
National Labor Relations Board v. *Electric Steam Radiator Corp.*, 321 F. 2d 733	8

Cases—Continued Page

National Labor Relations Board v. *Metropolitan Life Insurance Co.*, No. 98, this Term, decided April 5, 1965 8
National Labor Relations Board v. *Mexia Textile Mills, Inc.*, 339 U.S. 563 8
National Labor Relations Board v. *Oregon Worsted Co.*, 94 F. 2d 671 9
National Labor Relations Board v. *Smythe*, 212 F. 2d 664 7
National Labor Relations Board v. *Trinity Valley Iron and Steel Co.*, 290 F. 2d 47 8-9

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)
Section 8(a)(1) 6
Section 8(a)(5) 6
Section 9(b) 2
Section 9(c)(5) 3, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 942

GILVIN-TERRILL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A2) is reported at 338 F. 2d 971. The Board's decision and order in the unfair labor practice case (R. 105-107, 76-83)[1] are reported at 143 NLRB 868. The Board's decision and direction of election in the un-

[1] "R." and "J.A." refer to the printed transcript of record and joint appendix in the court of appeals, which have been filed with the petition.

derlying representation case (R. 29-32) are unreported.

JURISDICTION

The decision of the court of appeals was entered on November 27, 1964. A petition for rehearing was denied on December 29, 1964, and a decree was entered on January 7, 1965 (Pet. A1-A4). The petition for a writ of certiorari was filed on March 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board abused its discretion under Section 9(b) of the National Labor Relations Act or violated Section 9(c)(5) of the Act in establishing a bargaining unit consisting of the employees working at one of petitioner's shops rather than a unit consisting of all petitioner's employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) are as follows:

> Sec. 9(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .
>
> * * * *

(c) * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

STATEMENT

At a hearing on a representation petition filed by the International Union of Operating Engineers, Local 191, AFL-CIO (hereinafter "the Union"), which sought an election in a unit consisting of the employees at the petitioner's Bolton shop, the following facts were adduced:

The petitioner is an engineering construction firm engaged in the construction of highways and highway bridges (R. 30; J.A. 10). Its main office, from which it directs its operations in the northwest part of Texas, is located at 413 East Third Street, Amarillo, Texas. It employs some 191 employees on construction projects throughout that area (R. 30; J.A. 15, 55, 76).

Petitioner also maintains a shop at 2000 Bolton Street in Amarillo, about 3½ miles from the main office, where one foreman, one timekeeper, five mechanics and two welders are engaged in the repair of heavy construction equipment (R. 30; J.A. 60, 84, 122). The shop foreman, Floyd Weed, is directly in charge of the shop operations, and he has the authority to, and does, hire and discharge employees at the shop (R. 30; J.A. 61-62, 69-70, 112). Weed does not supervise truckdrivers or employees in the

field, such as equipment operators and laborers (R. 31; J.A. 62). Field employees are supervised by the field foremen (J.A. 68-69).

At the shop, the mechanics perform general mechanical repairs on such equipment as tractors, motor graders, and rollers (R. 30; J.A. 52, 110-112). Upon occasion, Foreman Weed sends them out into the field to perform repairs. At such times, they only perform a specific repair, remain under Foreman Weed's supervision, and return to the shop upon completion of the work (R. 30; J.A. 62, 67, 72-74, 91-92, 111-113, 117-121). Occasionally, when equipment is brought into the shop from the field, the operator of the equipment may come in with it. However, at such times, the operator does not come into the shop and work as a mechanic or a welder; he works only on his own equipment, remains classified as an operator, and returns to the field when the repair is completed (R. 30; J.A. 52-53, 65-66, 93-94, 112-116). With the exception of these temporary "transfers," there is no intermingling of shop employees and field employees. There is no previous bargaining history for the shop employees (R. 30; J.A. 41).

Upon these facts, the Board's Regional Director concluded that the employees in the shop constituted a "functionally homogeneous group" and that, "since there is no bargaining history for these employees, no union seeks a broader unit, the shop is physically separated from the Employer's other operations and there is independent supervision of the shop employees, we conclude that a unit limited to the shop

employees is appropriate" for the purposes of collective bargaining (R. 30). The Regional Director also found that the timekeeper, who maintains the time records and the parts bin in the shop, was a plant clerical employee who, in accord with Board policy, should be included in the unit (R. 30-31; J.A. 83-84, 122). Accordingly, the Regional Director, on December 14, 1962, directed an election in a unit of (R. 31):

> All employees at the Employer's shop at 2000 Bolton, Amarillo, Texas, including the timekeeper, but excluding all other employees, office clerical employees, truck drivers, professional employees, guards, watchmen, and supervisors as defined in the Act.[2]

Petitioner filed a request with the Board for review of the Regional Director's determination. It was denied as raising no substantial issues of fact or law warranting review (R. 78-79; J.A. 2-3, 32-45). The Union won the ensuing election, and it was certified as the bargaining representative (R. 78; J.A. 3, 50-53).

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[2] At the hearing, the Union amended its petition to include truckdrivers. Petitioner's truckdrivers are stationed in a building adjacent to the shop. Their primary duty is moving equipment from job site to job site. They also move equipment from the field to the shop, but they do not work in the shop, and they have separate supervision from the shop employees (R. 31; J.A. 43-44, 62-64, 85, 122-123). The Regional Director concluded that the truckdrivers are engaged in transportation, that their interests are dissimilar from those of the shop employees, and that they should be excluded from the unit (R. 31).

The Union then requested the petitioner to bargain with it, but petitioner refused, asserting that the Board's unit determination was invalid (R. 78; J.A. 3). In the ensuing unfair labor practice case, the Board found that petitioner violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union (R. 105-107, 80-81). The Board ordered the petitioner to cease and desist from its unfair labor practice, to bargain with the Union upon request, and to post appropriate notices (R. 105-107, 81-85).

The court of appeals, in a *per curiam* decision, found that the Board did not abuse its discretion in establishing the shop-wide unit, and it enforced the Board's order (Pet. A1-A2).

ARGUMENT

The decision of the court of appeals is correct. It is not in conflict with the decision of any other court, and there is no occasion for further review.

1. Petitioner's initial claim that the Board abused its discretion in carving out the shop employees as a separate bargaining unit (Pet. 5-12) is without merit. The normal working site of the shop employees is physically separated from petitioner's other operations; the shop employees are under independent supervision; and there is no permanent interchange between them and other employees (pp. 3-4, *supra*). In these circumstances, it was reasonable for the Board to conclude that the shop employees

constituted a separate functional unit or subdivision of petitioner's operations.[3]

There is no substance to petitioner's contention that the "integrated" nature of its operation made only a company-wide unit appropriate. The degree of "integration" in the operation involved in this case is essentially the same as that in many others where the various segments of the business are interdependent in an overall sense. But such "integration," at best, merely provides several alternative appropriate units among which the Board must choose. If the Board's choice of a smaller unit is reasonable, as it is here, the fact that a larger unit would also be appropriate is insufficient to show an abuse of discretion. *National Labor Relations Board* v. *Smythe*, 212 F. 2d 664, 667-668 (C.A. 5); *National Labor Relations Board* v. *Burroughs Corp.*, 261 F. 2d 463, 466-467 (C.A. 2); *The Mountain States Telephone and Telegraph Co.* v. *National Labor Relations Board*, 310 F. 2d 478, 480 (C.A. 10); *General Instrument Corp.* v. *National Labor Relations Board*, 319 F. 2d 420, 422-423 (C.A. 4), certiorari denied, 375 U.S. 966.

2. Petitioner's contention (Pet. 16-17) that the Board violated Section 9(c)(5) of the Act stands on no better footing. That provision "was not intended to prohibit the Board from considering the extent of organization as one factor, though not the control-

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[3] *Greene Construction Co.*, 133 NLRB 152, and *Broomall Construction Co.*, 137 NLRB 344 (Pet. 11), are not to the contrary. The units sought and found inappropriate there did not, as here, have a physically separate work place under separate intermediate supervision.

ling factor, in its unit determination." *National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, No. 98, this Term, decided April 5, 1965. Since, as we have shown, the unit determination here was based partly upon expressed principles other than extent of organization—such as physical separation and independent supervision—no issue under Section 9(c)(5) is presented. Nor was it a denial of due process for the Board to decline to hear the testimony petitioner was prepared to offer, showing that the Union was motivated by extent of organization in requesting the shop unit (Pet. 12-16). That evidence, even if true, was irrelevant, because the question under Section 9(c)(5) is whether *the Board* is motivated by the extent of organization, and not what prompted the Union to make the request.

3. Petitioner contends (Pet. 17-21) that, after the Board entered its order, it discontinued the operation at 2000 Bolton, and thus the bargaining order became moot and should not have been enforced by the court of appeals. But, under settled authority, the proper time to determine the facts raised by such an allegation and the steps which may be necessary to conform the order to any changed situation is during the subsequent compliance stage of the Board's proceeding. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563; *National Labor Relations Board* v. *Electric Steam Radiator Corp.*, 321 F. 2d 733, 738 (C.A. 6); *National Labor Relations Board* v. *Trinity Valley Iron and Steel Co.*, 290 F.

2d 47, 48 (C.A. 5).[4] The facts alleged by petitioner do not show that the only permissible course available to the Board at the compliance stage is to vacate the order. It appears that petitioner is still in business, and it may, in the future, decide to resume the repair work formerly done by the employees who made up the unit involved in this case.[5]

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[4] *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.*, 90 F. 2d 520 (C.A. 3); and *National Labor Relations Board* v. *Oregon Worsted Co.*, 94 F. 2d 671 (C.A. 9) (Pet. 19), which hold that compliance renders a Board order moot, preceded, and are inconsistent with, *Mexia*.

[5] For this reason, *Continental Oil Co.* v. *National Labor Relations Board*, 113 F. 2d 473, 478 (C.A. 10), modified on another point and remanded, 313 U.S. 212 (Pet. 20), is distinguishable. The court there noted that the facts stated by the company demonstrated that the operation involved would never be resumed.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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